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STATEMENT OF ISSUES

- I. GENUINE ISSUES OF MATERIAL FACT PRECLUDED THE LOWER COURT'S GRANTING OF SUMMARY JUDGMENT IN FAVOR OF COUNTRYWIDE AND THE BANK OF NEW YORK.**
- II. NEITHER COUNTRYWIDE NOR THE BANK OF NEW YORK ARE ENTITLED TO RAISE AND MAINTAIN THE ARGUMENTS RIGHTFULLY HELD BY CINDY S. FAVRE.**
- III. REBUILD AMERICA IS ENTITLED TO A DETERMINATION OF A REDEMPTION AMOUNT, COMPRISED OF ALL OUTSTANDING TAXES PAID BY REBUILD AMERICA, IN ADDITION TO STATUTORY PENALTY AND INTEREST THEREON.**

SUMMARY OF THE ARGUMENT

At the time of each Chancery Clerk's Conveyance and commencement of the lawsuit by Rebuild America to quiet and confirm tax title, Cindy S. Favre had an ownership interest in the property the subject thereof, while Countrywide Home Loans, Inc. (hereinafter "Countrywide") and The Bank of New York (hereinafter "BoNY") were lienholders. Cindy S. Favre, together with her husband, Scott M. Favre, also named as a defendant by Rebuild America, filed their Answer to the Complaint on June 27, 2008, setting forth no Affirmative Defenses and asserting no Counterclaim to set aside the two (2) separate Chancery Clerk's Conveyances delivered April 30, 2007 to Wolf Run, LLC and January 24, 2008 to Sass Muni V, predecessor in title to Rebuild America.

On July 15, 2008, however, Scott Favre and Cindy Favre filed a Complaint in the United States District Court for the Southern District of Mississippi seeking an unspecified amount of compensatory and punitive damages against Countrywide and BoNY based upon Countrywide's failure to pay 2003 and 2004 Hancock County taxes, despite having the money to do so by reason of the timely payments made by Cindy Favre to escrow and

despite having received the statutorily required notice from the Hancock County Chancery Clerk via certified mail prior to expiration of the applicable redemption period.

On August 29, 2008, Rebuild America filed its Motion for Summary Judgment, to which Countrywide and BoNY responded. Cindy S. Favre filed no response to the Motion for Summary Judgment. A hearing was held before the court on January 22, 2009, at which argument was made by Rebuild America, Countrywide and BoNY. Though counsel for Cindy S. Favre and Scott M. Favre was present, no argument was made on their behalf.

Rather than vigorously pursue return of the property in the action initiated by Rebuild America, Cindy S. Favre, with her husband, chose a monetary settlement paid by Countrywide and/or BoNY, in exchange for which Mrs. Favre conveyed her interest in and to the property to Countrywide by Quitclaim Deed filed in the office of the Chancery Clerk of Hancock County on June 4, 2009.

Countrywide and BoNY herein seeks title to the property so as to recoup the loss incurred by their settlement of the federal action, caused solely by their respective negligence. In so doing, Countrywide and BoNY avoided trial scheduled within days of the filing of their Motion for Summary Judgment, a trial at which Cindy S. Favre would have been compelled to testify by Subpoena already issued by the Hancock County Chancery Clerk, and utilized deposition testimony taken in the federal action, in which Rebuild America was not a party. Countrywide and BoNY also seek to "step into the shoes" of Cindy S. Favre, advancing those arguments which rightfully belonged to Mrs. Favre, but which she chose not to advance, opting to pursue a federal action for damages against Countrywide and BoNY and thereafter to settle for an undisclosed amount.

Rebuild America maintains that the use in this action of the deposition testimony of Cindy S. Favre and Scott M. Favre given in the federal action constitutes error on the part of the lower court, Rebuild America neither present nor represented at those depositions as taken in the federal action. Rebuild America further maintains that Countrywide and BoNY are confined to their standing as lienholders, and therefore the argument and relief specific to lienholders under Mississippi law.

ARGUMENT

A. **Genuine Issues of Material Fact Precluded the Lower Court's Granting of Summary Judgment in Favor of Countrywide and The Bank of New York.**

The use and consideration of those depositions taken of Cindy S. Favre and Scott M. Favre in the federal action by the lower court were improper. Cindy S. Favre, the previous title owner of the subject property, was an original party to this action, and was an available witness, who was compelled to appear and offer testimony at the trial of this matter scheduled within days of the Motion for Summary Judgment filed by Countrywide and BoNY by virtue of a Subpoena already issued by the Hancock County Chancery Clerk.

In support of the Motion for Summary Judgment, Countrywide and BoNY attached, referred to and relied upon the deposition testimony of Cindy S. Favre and Scott M. Favre as given in the federal action. Rebuild America was not a party to the federal action, and was not provided either notice nor an invitation to participate in these depositions. Pursuant to Rule 32(a) of the Mississippi Rules of Civil Procedure, any part or all of a deposition may be used against "any party who was present or represented at the taking of the deposition or who had reasonable notice thereof." The depositions of Cindy S. Favre and Scott M. Favre were clearly used against Rebuild America, even though Rebuild

America had not been present or represented at these depositions and therefore, was not afforded the opportunity to cross-examine the deponents.

Furthermore, the deposition testimony of Cindy S. Favre and Scott M. Favre comprised, for which no exception applied under either Rule 801(d) or Rule 803 of the Mississippi Rules of Evidence. Whether or not Rebuild America chose to depose Cindy S. Favre or Scott M. Favre is irrelevant. Countrywide and BoNY likewise chose not to depose Cindy S. Favre and Scott M. Favre in this action. Instead, Countrywide and BoNY impermissibly relied upon the testimony elicited from Cindy S. Favre and Scott M. Favre in the federal action.

Countrywide and BoNY contend that, even if the court's consideration of the deposition of Cindy S. Favre and Scott M. Favre was impermissible, such error is harmless, the Court having found that the notice afforded Mrs. Favre prior to expiration of the redemption period was insufficient. However, the facts are difficult to reconcile since Mrs. Favre averred, under oath, within the Complaint initiating the federal action that she and/or her husband had actual knowledge of the tax sale prior to forfeiture of the property by the 2007 Chancery Clerk's Conveyance. Mrs. Favre states knowledge of notice provided to her former residence address and thereafter complains that Countrywide and BoNY failed to respond following e-mails, telephone calls and other correspondence written to Countrywide and/or BoNY prior to the 2007 Chancery Clerk's Conveyance. These facts comprise material issues in dispute, for which summary judgment should not have been granted by the court, and for which Rebuild America seeks a trial upon the merits.

B. Neither Countrywide nor The Bank of New York are Entitled to Raise and Maintain the Arguments Rightfully Held by Cindy S. Favre.

At the time of the commencement of this action, Countrywide and BoNY held an interest in the property the subject hereof as lienholders, while Cindy S. Favre held an interest as a previous owner. The statutory notice requirements and the relief afforded a lienor as opposed to an owner is, without question, different. *Compare* Miss. Code Ann. § 27-43-3 and Miss. Code Ann. § 27-43-5. The Chancellor erred in its reliance upon *Rebuild America, Inc. v. Milner* and *Moore v. Marathon Asset Management, LLC*, its failure to make specific factual findings pertaining to the standing of Countrywide and BoNY and, more importantly, its setting aside of the Chancery Clerk's Conveyance(s) based upon those arguments premised upon § 27-43-3, Miss. Code Ann., belonging to the previous owner, Cindy S. Favre.

The issue of standing is determined at the commencement of the lawsuit. *Rebuild America v. Milner*, 7 So. 3d 972, 975 (¶ 11)(Miss. Ct. App. 2009), *quoting Delta Health Group, Inc. v. Estate of Pope*, 995 So. 2d 123, 126 (¶ 13)(Miss. 2008); *see also Osborn v. Harrison*, 447 So. 2d 122, 123 (Miss. 1984). At the commencement of the lawsuit in *Rebuild America v. Milner*, Robert and Patricia Milner held an interest as the previous owners, having failed to execute and deliver a Quitclaim Deed and Assignment to Rebuild America, which, arguably, would have divested Mr. and Mrs. Milner of any colorable interest and standing upon which to oppose the quiet title and confirmation action of Rebuild America. Mr. and Mrs. Milner successfully pursued a counterclaim within that action, with the court setting aside the Chancery Clerk's Conveyance by reason of the Chancery Clerk's failure to provide

to Mrs. Milner her own, separate written Notice of Forfeiture by certified mail and personal service.

Based upon the *Milner* decision, Cindy S. Favre's conveyance of the subject property to Countrywide by Quitclaim Deed subsequent to the date of commencement of this lawsuit divested her of title and ownership of said property but did not alter the parties' respective standing in this lawsuit, nor transfer to Countrywide and BoNY those arguments vested in one holding an ownership interest.

Likewise, *Moore v. Marathon Asset Management, LLC*, 973 So. 2d 1017 (Miss. Ct. App. 2008), does not support the argument of Countrywide and BoNY or the ruling of the lower court. Napoleon Moore purchased property at a foreclosure sale seventy-six days prior to expiration of the redemption period following an August 27, 2001 tax sale. *Id.* at 1019 (¶ 5). Since Mr. Moore was not the owner of record of the property as of 180 days prior to the expiration of the redemption period, the Hinds County Chancery Court found he was not entitled to statutory notice. *Id.* (¶ 7).

Upon appeal, this Court determined that, while Edward Chapman was the owner of record 180 days before expiration of the redemption period, he no longer held title to the property nor any interest in the property when the redemption period expired by reason of the foreclosure. *Id.* at pp. 1021-1022 (¶¶ 18, 19). After Mr. Chapman's default, the lienor, LaSalle Bank, acquired title to the property and a right to possession thereof. After the foreclosure sale, Mr. Chapman was divested of all legal and equitable interest in the property. As a purchaser at a foreclosure sale, Mr. Moore stepped into the shoes of the title owner. Thus, Mr. Moore was entitled to advance and rely upon those arguments afforded an owner as set forth within § 27-43-3, Miss. Code Ann.

Such is not the case here. Countrywide and BoNY did not acquire title to the property by foreclosure prior to expiration of the applicable redemption period(s). Countrywide and BoNY are therefore not similarly situated to LaSalle Bank in *Moore*, since LaSalle Bank was not the lienor prior to expiration of the redemption period, but was, by virtue of Mr. Chapman's default and the resulting foreclosure sale, the owner of the property. At all relevant times, i.e., expiration of the applicable redemption period(s) and commencement of this lawsuit, Countrywide and BoNY held interest in the property as lienors, not as owners. As lienors of record, Countrywide and BoNY received their statutorily required notice pursuant to § 27-43-5, Miss. Code Ann.¹, and are foreclosed from relying upon those arguments vested in an owner by virtue of § 27-43-3, Miss. Code Ann., to remedy their own respective negligence, having received written notice and taken no action to redeem the property to protect either its own interests or that of its mortgagor, Cindy S. Favre.

Rebuild America finds support for its position in *Curtis v. Carter*, 906 So. 2d 758 (Miss. 2005), *Green Tree Servicing, LLC v. Dukes*, 25 So. 3d 399 (Miss. Ct. App. 2009), and *Wachovia Bank, N.A. v. Rebuild America, Inc.*, 56 So. 3d 586 (Miss. Ct. App. 2011). In *Curtis*, the Court found error on the part of the lower court in setting aside an entire tax sale, as

¹ Preceding the Chancery Clerk's Conveyance delivered to Wolf Run, LLC on April 30, 2007, Lienor's Notice of Forfeiture was issued by the Hancock County Chancery Clerk, and mailed to Countrywide via certified mail, received on April 10, 2006, as evidenced by return receipt; and Lienor's Notice of Forfeiture was issued by the Hancock County Chancery Clerk and mailed to BoNY via certified mail, received on April 10, 2006, as evidenced by return receipt. (R. Vol. 7 at 00936-00937, 00940, 00942). Preceding the Chancery Clerk's Conveyance delivered to Sass Muni V, Lienor's Notice of Forfeiture was issued by the Hancock County Chancery Clerk and mailed to Countrywide via certified mail, received on June 4, 2007, as evidenced by return receipt; and Lienor's Notice of Forfeiture was issued by the Hancock County Chancery Clerk and mailed to BoNY via certified mail, received on June 4, 2007, as evidenced by return receipt. (R. Vol. 5 at 00646-00647, Vol. 7 at 00953-00954).

opposed to setting aside the tax sale only insofar as it pertained to the lienholders' interests such that those persons having ownership interests were not parties to the lawsuit. 906 So. 2d at 759-760 (¶ 7).

While the lienor in *Green Tree Servicing* contended that the tax sale should have been set aside because the clerk (1) failed to provide the owner, Francis Sullivan, notice of forfeiture by personal service (2) failed to strictly comply with tax sale procedures, and (3) failed to mail the correct statutorily proscribed notice, this Court defined the "core issue" as whether the tax sale was valid as to the lienholder. 25 So. 3d at 403 (¶ 11). Though the tax sale was set aside, it was done so on the basis that the notice provided to Green Tree Servicing did not comply with that form proscribed by § 27-43-5, Miss. Code Ann., and only insofar as the tax sale pertained to the lienor's interest in the property. *Id.* at 404 (¶ 15).

Likewise, Wachovia Bank and Mid-State Trust VII were limited by the lower court to "whether or not the sale for 2002 Jones County ad valorem taxes was void as to the lienholder . . . for lack of proper notice of maturation pursuant to the provisions of Section 27-43-5 of the Mississippi Code . . ." 56 So. 3d at 587 (¶ 5). As in *Green Tree Servicing*, the tax sale was found void because the chancery clerk failed to provide the lienholder sufficient notice in compliance with § 27-43-5, Miss. Code Ann., but only as to the lienholder. The tax sale was not set aside in its entirety.

Given their standing as determined at the commencement of the lawsuit, Rebuild America contends that Countrywide and BoNY are limited to only those arguments pertaining to the sufficiency of notice as proscribed by § 27-43-5, Miss. Code Ann. In that Countrywide and BoNY each received the statutorily required notice of § 27-43-5, Miss. Code Ann., and neither have complained of the form or sufficiency thereof, summary

judgment was erroneously granted in favor of Countrywide and BoNY. Rebuild America therefore requests the Judgment of the lower court be reversed and rendered in its favor.

C. Rebuild America is Entitled to a Determination of a Redemption Amount, Comprised of All Outstanding Taxes Paid by Rebuild America, In Addition to Statutory Penalty and Interest Thereon.

Rebuild America reiterates its request for remand so that the chancery court may determine the appropriate statutory redemption amount owed to Rebuild America in accordance with § 27-45-3, Miss. Code Ann., § 27-45-27, Miss. Code Ann., *Lawrence v. Rankin*, and *Rebuild America, Inc. v. McGee*, 49 So. 3d 156 (Miss. Ct. App. 2010). Rebuild America requested, within its Complaint to Quiet and Confirm Tax Title, reimbursement of all taxes paid by, and on behalf of, Rebuild America, with interest thereon. (R. Vol. 1 at 00008 - 00009).

Section 27-45-3, Miss. Code Ann., states, in pertinent part, as follows:

The owner, or any persons for him with his consent, or any person interested in the land sold for taxes, may redeem the same, or any part of it . . . by paying to the chancery clerk, regardless of the amount of the purchaser's bid at the tax sale, the amount of all taxes for which the land was sold, with all costs incident to the sale, and five percent (5.0% damages on the amount of taxes for which the land was sold, and interest on all such taxes and costs at the rate of one and one-half percent 1-1/2%) per month, or any fractional part thereof, from the date of such sale, and all costs that have accrued on the land since the sale, with interest thereon from the date such costs shall have accrued, at the rate of one and one-half percent (1-1/2%) per month, or any fractional part thereof.

In *Lawrence v. Rankin*, 870 So. 2d at 677 (¶¶ 19-22), the Court found error on the part of the lower court in failing to require the property owner to pay unto the tax sale purchaser, whose tax deed had been previously set aside by the lower court, the taxes paid, in addition to the penalty and interest due to him as provided by Mississippi statute. Likewise, in *Rebuild America v. McGee*, 49 So. 3d at 160 (¶¶ 10-13), the Court, following a Motion for Rehearing,

remanded the issue of damages for calculation by the lower court “[b]ecause the relief requested by Rebuild America [was] consistent with section 27-43-3 and our holding in *Lawrence*.”

Should Summary Judgment be affirmed by the Court, Rebuild America respectfully requests remand, with instruction to calculate all amounts owed to Rebuild America, inclusive of statutory penalty and interest at the rate of one and one-half percent (1-1/2%) per month, and designation of a date certain by which such amount is to be paid to Rebuild America. Further, Rebuild America requests that, should Countrywide and/or The Bank of New York fail or refuse to pay unto Rebuild America that amount to which it is owed on or before the date designated by the lower court, the subject property shall forfeit to Rebuild America.

In cases such as *Lawrence v. Rankin*, *Rebuild America v. McGee*, and *Hammett v. Johnson*, 624 So. 2d 58 (Miss. 1993), in which each tax deed was set aside by reason of insufficient notice, the parties were restored to their previous, respective positions of property owner and tax sale purchaser. The property owner is afforded the opportunity to redeem the property in accordance with § 27-45-3, Miss. Code Ann., and the tax sale purchaser holds title, subject to divestiture upon the property owner’s redemption.

Whereas the lower court’s denial of confirmation was affirmed in *Hammett v. Johnson*, 624 So. 2d at 60, the Mississippi Supreme Court required remand, in part, stating, in response to the chancellor’s declaration that the tax sale purchaser had no interest, whatsoever, in the property the subject of the action that,

Hammett bought the .086 acre parcel for taxes in 1985. No redemption has been made. Upon proper notice he [Hammett] is entitled to a tax deed for this

parcel should Johnson fail to pay the 1984 taxes, plus penalty and interest as prescribed by statute.

It is suggested that Hammett failed to pray for this relief. While that is true, as we read the decree of the chancery court, no fault is found with the manner in which Hammett acquired the tax title. Miss.Code Ann. § 27-41-79 (1972). The question is whether that title became absolute. We hold that it did not for failure of proper notice. As a result, the parties are left where they were. The property has not been redeemed. Johnson has now received actual notice of that fact. We remand to the chancery court for entry of a decree giving Johnson a time certain in which to redeem the .086 acre tract, not to exceed 60 days from the issuance of the mandate from this Court.

By the August 26, 2010 Summary Judgment, Countrywide was restored to the position of record owner of the Property, by virtue of the Quitclaim Deed from Scott Favre and Cindy Favre, while Rebuild America was restored to the position of tax sale purchaser of the Property. By the August 26, 2010 Summary Judgment, the lower court reinstated Countrywide's statutory right to redeem the Property. The litigation and this appeal comprise actual notice to Countrywide of its statutory right, and obligation to redeem the property within that certain time as may be designated by the lower court. In reliance upon *Hammett v. Johnson*, should Countrywide and/or BoNY refuse to "redeem" its property by making payment to Rebuild America in reimbursement of all taxes paid, with statutory penalty and interest thereon, then Rebuild America is entitled to a second Chancery Clerk's Conveyance, this time vesting perfect and absolute title in Rebuild America, as against Countrywide.

Should the Court affirm Summary Judgment, Rebuild America respectfully requests remand to the chancery court with instructions consistent with § 27-45-3, Miss. Code Ann., § 27-45-27, Miss. Code Ann., *Lawrence v. Rankin*, *Rebuild America, Inc. v. McGee* and *Hammett v. Johnson*.

CONCLUSION

For the above and foregoing reasons, Appellant, Rebuild America, Inc., respectfully requests that the judgment of the lower court be reversed, and rendered in favor of Rebuild America, Inc. Alternatively, should Summary Judgment be affirmed, Rebuild America requests remand to the lower court, with instruction for the calculation of the redemption amount owed to Rebuild America, inclusive of statutory penalty and interest thereon, and designation of a date certain by which such redemption amount must be paid.

Appellant prays for such further relief as may be proper in the circumstances.

Respectfully submitted, this the 29th day of August, 2011.

REBUILD AMERICA, INC.

By: 
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CERTIFICATE OF SERVICE

I, Kimberly P. Turner, do hereby certify that I have this date served by First Class United States mail, postage prepaid thereon, a true and correct copy of the above and foregoing, to the following:

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Hon. Carter Bise
Hancock County Chancery Judge
152 Main Street, Suite B
Bay St. Louis, Mississippi 39500

DATED, this the 29th day of August, 2011.



KIMBERLY P. TURNER (MBN [REDACTED])